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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ARNOLDO OZUNA GALAN,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Julie Ann Epps: MSB#5234
Counsel of Record for Petitioner
1142 Meadowbrook Road
Jackson, Mississippi 39206-6140
Telephone: (601) 366-0165
W.E. Gore, Jr.; MSB#4918
Post Office Box 186
Jackson, Mississippi 39205-0186
Telephone: (601) 969-7777
ATTORNEYS FOR PETITIONER,
ARNOLDO GALAN

60pp

QUESTIONS PRESENTED FOR REVIEW

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY WHERE GALAN SHOWED THAT HIS ATTORNEYS WERE SO INEFFECTIVE THAT THEY RELIED ON THE LEGALLY INSUPPORTABLE DEFENSE THAT HE SHOULD NOT BE CONVICTED BECAUSE THE SEARCH WAS BAD WHILE IGNORING THE VIABLE DEFENSE THAT THE EVIDENCE THE GOVERNMENT CLAIMED SHOWED HIS GUILT HAD BEEN SO CONTAMINATED BY POLICE DEPARTMENT MISHANDLING THAT NO REASONABLE JUROR COULD FIND HIM GUILTY.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THIS COURT'S RECENT DECISION IN *APPRENDI V. NEW* JERSEY, 120 S.CT. 2348 (2000), WHICH REQUIRES THAT ANY FACT WHICH INCREASES A SENTENCE BEYOND THE STATUTORY MAXIMUM MUST BE ALLEGED IN THE INDICTMENT AND PROVED TO THE JURY BEYOND A REASONABLE DOUBT, IS RETROACTIVELY APPLICABLE TO A FEDERAL PRISONER SUCH AS GALAN ON HIS FIRST §2255 MOTION FOR COLLATERAL REVIEW OF HIS CONVICTION SO THAT THE FIFTH CIRCUIT ERRED IN NOT ALLOWING GALAN TO AMEND HIS MOTION TO VACATE TO ALLEGE AN *APPRENDI* CLAIM.

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OPINIONS BELOW

On June 14, 2000, Circuit Judge Emilio Garza of the Court of Appeals for the Fifth Circuit denied Galan's request for a certificate of Appealability from the denial by the district court of his request for post-conviction relief from his federal conviction and sentence made pursuant to Title 28 U.S.C. §2255. *United States v. Galan*, ____ F.3d _____ (5th Cir. 2000) (5th Cir. June 14, 2000) (No. 99-50969). A copy of that opinion is attached as Appendix 1. Galan filed a motion for reconsideration by a panel of the Fifth Circuit which was denied on July 18, 2000. *See,* Appendix 2. Galan then requested rehearing *en banc* and leave to amend his motion to vacate to include a claim pursuant to *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). The Fifth Circuit denied rehearing and the motion to be allowed to amend his motion on August 21, 2000. *See,* Appendix 3. The district court's judgment denying Galan's §2255 Motion to Vacate is attached as Appendix 4. A copy of the district court's judgment of conviction and sentence is attached as Appendix 5.

JURISDICTION

By order dated June 14, 1999, United States District Court Judge for the Western District of Texas, Sam Sparks, denied Arnoldo Galan's Motion to Vacate filed pursuant to Title 28 U.S.C. §2255. *See,* Appendix 4. Judge Sparks denied Galan's request for a certificate of Appealability, and Galan then requested a certificate of appealability from the United States Court of Appeals for the Fifth Circuit. A single judge of that court denied Galan's request June 14, 2000. *See,* Appendix 1. A motion for panel rehearing was denied on July 18, 2000. *See,* Appendix 2. A motion for *en banc* consideration and for leave to amend his motion to vacate to include an *Apprendi* claim was denied August 21,

2000. *See,* Appendix 3. This Court has jurisdiction under Title 28 *U.S.C.* §1254(1), which provides that this Court may grant a petition for writ of certiorari by any party to a criminal or civil case after rendition of judgment by a Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Amend. V (pertinent parts):

   No person shall be deprived of life, liberty, or property, without due process of law . . . .

2. U.S. Const., Amend VI (pertinent parts):

   In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

3. 21 U.S.C. § 841(a)(1) (pertinent parts):

   Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

   (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

4. 21 U.S.C. § 841(b)(1)(D) (pertinent parts):

   Except as otherwise provided in sections 859, 860, or 861 of this title, any person who

violates subsection (a) of this section shall be sentenced as follows:

(D) In the case of less than 50 kilograms of marihuana . . ., such person shall . . . be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual . . . , or both.

5. 21 U.S.C. § 841(b)(1)(A)(vii) (pertinent parts):

Except as otherwise provided in sections 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana . . . , such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . , a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $4,000,000 if the defendant is an individual . . . , or both.

6. F.R.Civ.P. 15(a) (pertinent parts):

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the

pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

7. Rule 60(b), F.R.Civ.P. (pertinent parts):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment

or suspend its operation.

STATEMENT OF THE CASE

(a) Course of the Proceedings and Disposition in the Courts Below:

In 1993, Galan was convicted by jury and sentenced in the United States District Court for the Southern District of Texas, Sam Sparks, presiding, to 284 months for possession of marijuana with intent to distribute in violation of Title 21 U.S.C. §841(a)(1).

Galan appealed to the Fifth Circuit, which affirmed his conviction in an unpublished opinion on March 9, 1994, but remanded the case for resentencing because the evidence failed to support an increase for obstruction of justice. *United States v. Galan*, 19 F.3d 15 (5th Cir. 1994). Galan was resentenced to 235 months.

On April 21, 1997 Galan filed a §2255 Motion to Vacate and Set Aside Judgment or Correct Sentence on the drug charge. (R.7/217). Galan's principal argument was that his attorneys were ineffective at trial and sentencing. On May 29, 1998, the Magistrate recommended that the motion be denied without evidentiary hearing. (R.4/625). Galan objected, and the district judge in a written opinion filed on June 14, 1999, denied relief without a hearing. Appendix 4. (R.4/652,692). Subsequently, that court denied Galan's request for a Certificate of Appealability. (R.4/708,735). Galan appealed and requested a certificate from the Fifth Circuit. (R. 4/738,747).

On June 14, 2000, Circuit Judge Emilio Garza denied Galan's request for a Certificate. Appendix 1. Pursuant to Rule 27(c) FRAP and Local Rule 27.2, Galan moved for reconsideration by a panel of the Fifth Circuit. On July 18, 2000, the panel, Judges Garza, Davis and Dennis, denied reconsideration. *See*, Appendix 2. Galan

then requested rehearing *en banc* and also requested that the case be remanded to allow him to amend his Motion to Vacate to include a claim that his sentence violated *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). These requests were denied without written opinion on August 21, 2000. *See*, Appendix 3.

(b) Statement of Facts:

Pursuant to an anonymous tip, officers conducted surveillance of Joel Kirby's home in late 1992. After witnessing suspicious behavior and discovering marijuana plants hidden on an adjacent lot owned by Kirby, officers obtained and executed a search warrant on Kirby's residence.

Kirby evaded arrest by escaping into the woods. Galan was arrested exiting a game room of the house. He identified himself as Ricardo Prado. Officers found firearms and $200,000 cash in the game room.

According to police, a search of the house revealed a brown leather bag in an upstairs room containing marijuana, yellow pieces of paper containing weight notations, identification cards with Galan's name on them, and a passport in the name of Ricardo Herrera Prado, but bearing Galan's photograph. In a garage, officers found 980 pounds of marijuana baled in weights allegedly corresponding to the entries on the yellow papers.

At trial, the government relied on testimony from Kirby, who had been apprehended five days before trial, to establish that Galan had knowledge of and intended to possess the marijuana. Since Kirby's testimony was suspect because he was testifying in return for sentencing concessions, the government argued that the jury should find that certain demonstrative evidence corroborated his evidence and supported a verdict of guilty.

Specifically, the government argued that since the

bag found during the search contained both Galan's identification and the drug logs, and because testimony established that the logs "exactly" matched the marijuana in the garage, the jury should infer that Galan knew about the drugs. R.8/394,396,397,422.

The government also argued that the logs, which were dated August 11, 1992, corresponded to the date of an anonymous tip given on August 12, 1992. The hearsay recording of the tip that was admitted into evidence had two women describing bales of marijuana that they had seen being unloaded from a trailer at Kirby's house. From this tip, the government asked the jury to infer corroboration of Kirby's testimony that Galan had delivered 3000 pounds of marijuana in a horse trailer to the house at that time. R.8/344,391,393,394,397.

Galan's sentence of 235 months was based on a preponderance of the evidence finding by the trial judge that Galan was responsible for more than 1000 kilograms of marijuana. Galan's indictment, however, did not charge him with possession of a particular amount of marijuana; nor was the jury instructed to find drug quantity. The indictment charged only that Galan "knowingly and intentionally did possess with intent to distribute marijuana, a Schedule I controlled Substance in violation of Title 21, United States Code, Section 841(a)(1)." R.I/17.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY WHERE GALAN SHOWED THAT HIS ATTORNEYS WERE SO INEFFECTIVE THAT THEY RELIED ON THE LEGALLY INSUPPORTABLE DEFENSE THAT

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In the brief Galan filed in support of his application for a Certificate of Appealability, he argued that although his attorneys were physically present at the trial, they were more of a hindrance than help. Among other things, they misconstrued the law and introduced prejudicial evidence suggesting other misconduct which would otherwise have been inadmissible. They were so inept that Galan would have actually been better off had they not been there.

Having failed to understand that they bore the burden of going forward at the motion to suppress with evidence to impeach the facial validity of the search warrant, they attempted to convince the jury that Galan should not be convicted because the evidence was illegally seized. In pursuit of this ill-conceived tactic, they elicited volumes of otherwise inadmissible hearsay and evidence of other wrongdoing, including the otherwise inadmissible search warrant affidavit. Their cross-examinations of witnesses were rambling and incomprehensible. In fact, the trial judge rebuked counsel because of their pointless ramblings.[1]

Even more prejudicial to Galan than his attorneys' introduction of prejudicial and inadmissible evidence was their failure to develop an available defense to demonstrate

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[1] Galan has detailed specific examples of counsels' deficiencies with regard to evidentiary matters in his Brief in support of his motion to vacate and his application for COA.

his innocence. For example, Galan's attorneys failed to determine the reliability of the government's demonstrative evidence or to develop available means to impeach it.

Galan was found in someone else's house. A large quantity of marijuana was found in the garage. The government's theory that Galan knew of the marijuana was based on evidence from one of Galan's codefendants[2] and on demonstrative evidence that Galan was involved because at the time of his arrest, he was coming from a room containing a large sum of money and because documents which the government claimed were drug logs of the marijuana were found in a bag which contained his passport.

A competent attorney would have understood that the jury issue in this case was not whether or not the search was fair, but was rather whether or not the government's proof showed Galan's knowledge of and intent to possess the marijuana. In other words, Galan's defense necessarily depended on discrediting testimony from the codefendant, who was testifying in return for a substantially reduced sentence,[3] and on impeaching the evidence supporting the

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[2] Galan's attorneys also failed to discover available evidence impeaching his credibility. Galan has detailed the available impeachment evidence in his affidavits attached to his motion and in his previously filed briefs and memoranda.

[3] In addition to failing to discover evidence discrediting the codefendant, counsel actually suggested to the jury that the codefendant had little to gain by testifying for the government. Moreover, counsel allowed the prosecution to misrepresent the full extent of the Kirby's sentencing concessions. The government argued that Kirby would still get twenty years in return for his testimony. In fact, by testifying, he rid himself of a potential life sentence without parole, and did get five years. Kirby would have revealed the true nature of the deal if asked. *See,* Kirby's affidavit attached to Motion. Because of counsel's failure to investigate and effectively cross-examine Kirby, the

idea that the drug logs were found in a bag along with Galan's identification.

Minimal investigation would have disclosed to trial counsel, as it did to present counsel, that evidence was available to discredit the codefendant and the government's theory that either the logs or Galan's identification documents were in the bag at the time of the search. In fact, it seems fairly clear that the logs or the identification, or both, were found elsewhere and negligently placed in the bag by officers conducting the search.[4]

This was not a trial where the attorneys made a reasonable strategic choice to forego one defense for another. Galan's attorneys simply failed to investigate either the facts or the law and were therefore unable to prepare any defense that would have made the trial an

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jury was not in a position to fully evaluate his credibility because they were left with the impression that Kirby had little to gain by testifying falsely.

[4] The evidence consisted of testimony and documents suggesting that the identification documents were on Galan himself at the time he was arrested and that the logs were found on a television set in the house rather than in the bag. A reasonable doubt about where either was found would have been sufficient to discredit the government's theory that Galan knew of and possessed the marijuana in the garage since the theory depended on the juxtaposition of the identification and the logs together in the bag. Galan's investigation also disclosed evidence demonstrating without a doubt that the law enforcement agency conducting the search lacked a trained evidence technician and failed to observe even minimal standards in gathering and cataloging evidence, evidence which would have additionally supported the evidence suggesting that the logs and identification were not found as cataloged. Galan attached to his initial motion to vacate affidavits from present counsel and an expert in forensic science regarding specific deficiencies in the police department's evidence gathering and recording procedures. (Exhibits D and E to Motion).

adversarial proceeding. *United States v. Cronic*, 466 U.S. 648, 659 (1984). Galan's attorneys' deficient performance prejudiced his defense under *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 675 (1984).[5]

Here more inadmissible and prejudicial evidence was presented to the jurors than was admissible evidence. Together with the failure of Galan's attorneys to recognize and present an available viable defense, the trial was rendered fundamentally unfair.[6] Had Galan's attorney's impeached the government's theory that Galan knew of the drugs, a reasonable juror would have had a reasonable doubt of his guilt. Without knowledge, Galan could not have been guilty of knowingly and intentionally possessing the drugs.

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[5] (Test is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"]. *Id.*, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[6] *Berryman v. Morton*, 100 F.3d 1089, 1100-01 (3rd Cir. 1996) [attorney's failure to adequately prepare and put on reasonable defense found to be ineffective]; *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994)[failure to investigate alibi defense not a strategic choice but abdication of responsibility], *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987)[same, insanity defense], *United States v. Gray*, 878 F.2d 702 (3rd Cir. 1989)[same, self-defense], *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355 (7th Cir. 1990)[same, eyewitness] and *DeLuca v. Lord*, 77 F.3d 578 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 83 (1996)[same, extreme emotional disturbance]; *Groseclose v. Bell*, 895 F.Supp. 935, 957-60 (M.D.Tenn. 1995), *aff'd* 130 F.3d 1161 (6th Cir. 1997), *cert. denied* 523 U.S. 1132 (1998) [counsel's failure to investigate substantial defenses available to defendant and assert them in a proper and timely fashion was ineffective]; *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) [attorney's decision not to put on witnesses in support of viable defense because "he felt the prosecution's case was weak" was ineffective].

As present counsel have shown, Galan's attorneys easily could have discovered evidence to impeach the Government's evidence that the drug logs belonged to Galan. Post-conviction counsel found substantial evidence to suggest that the logs were not found in Galan's bag at the time of the search and that they did not belong to Galan.

In addition to failing to develop a viable defense, Galan's attorneys also failed to point out the government's true deal with the testifying codefendant who had substantially more to gain than the government led the jury to believe.

A certificate of appealability should issue upon "a substantial showing of the denial of a constitutional right."[7] This means that Galan need not show that he should prevail on the merits. *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983). Rather a certificate must issue if the appeal presents a "question of some substance," *i.e.*, an issue (1) that is "'debatable among jurists of reason'"; (2) "'that a court could resolve in a different manner'"; (3) that is "'adequate to deserve encouragement to proceed further'"; or that is not "squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." *Id.* at 894.

Barefoot requires only that Galan make a substantial showing that his attorney misapprehended the law, failed to develop an available defense, and engaged in a defense, which, even in the government's words was pointless and offensive. In rejecting Galan's request for a certificate, the Court of Appeals has in effect required him to show that he would prevail on the merits rather than just that he has presented claims that are debatable among jurists of reason. In so doing, the Fifth Circuit has decided the case in a way which conflicts with *Barefoot v. Estelle*, *supra*. Because Galan has shown that his claims are not "squarely

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[7] 28 U.S.C. §2253(C)(1)(2).

foreclosed by statute, rule, or authoritative court decision, [and that they have a] factual basis in the record," he has shown that he is entitled to a certificate of appealability. *Id.*, at 894.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THIS COURT'S RECENT DECISION IN *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348 (2000), WHICH REQUIRES THAT ANY FACT WHICH INCREASES A SENTENCE BEYOND THE STATUTORY MAXIMUM MUST BE ALLEGED IN THE INDICTMENT AND PROVED TO THE JURY BEYOND A REASONABLE DOUBT, IS RETROACTIVELY APPLICABLE TO A FEDERAL PRISONER SUCH AS GALAN ON HIS FIRST §2255 MOTION FOR COLLATERAL REVIEW OF HIS CONVICTION SO THAT THE FIFTH CIRCUIT ERRED IN NOT ALLOWING GALAN TO AMEND HIS MOTION TO VACATE TO ALLEGE AN *APPRENDI* CLAIM.

Galan's indictment did not charge him with possessing a specific amount of marijuana but rather charged only that he "knowingly and intentionally did possess with intent to distribute marijuana, a Schedule I controlled Substance in violation of Title 21, United States Code, Section 841(a)(1)." R.I/17. Furthermore, the issue of quantity was not submitted to the jury. Instead, the trial judge found by a preponderance of the evidence at sentencing that Galan had possessed in excess of 1000 kilograms of marijuana and sentenced him to 235 months imprisonment.

At the time of Galan's trial and sentence, the law in the Fifth Circuit was that drug quantity was not an

element of the offense and that the government need not plead it in the indictment nor prove it beyond a reasonable doubt to the jury. Subsequent to Galan's filing his motion to reconsider Judge Garza's decision denying his Certificate of Appealability, this Court decided *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). That case holds that, other than the fact of prior conviction, the constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. 120 S.Ct. at 2362-63

The charge in Galan's indictment, possession of marijuana with intent to distribute, carries a maximum penalty of five years and/or a fine of $250.000.00. 21 U.S.C. 841(b)(1)(D). Galan, however, was sentenced to 235 months imprisonment pursuant to 21 U.S.C. 841(b)(1)(A)(vii) which provides for a penalty for possession with intent to distribute 1000 kilograms or more of marijuana of not less than 10 years nor more than life and a fine of not more than four million dollars. In short, Galan was sentenced to more than the five-year maximum sentence for the charged offense. Clearly *Apprendi* would prohibit any sentence over five years because drug quantity was not alleged or proved. *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000) [drug quantity is element which must be alleged and proved beyond a reasonable doubt if sentence is above statutory maximum authorized by jury's verdict]; *United States v. Doggett*, ____ F.3d ____, (5th Cir. Oct. 6, 2000) (No. 99-50380) concluding that "there is no reasonable construction of § 841 that would allow us to avoid the broad constitutional rule of *Apprendi* (that) drug quantity (is) an element of the crime under 21 U.S.C. §§ 841 and 846"].

The Fifth Circuit erred when it refused to allow Galan to amend his Motion to Vacate. Since the Fifth Circuit denied Galan's motion without opinion, its

rationale is unclear. However, if the Fifth Circuit denied review based on the rationale that *Apprendi* is not retroactive to cases on collateral review, then the Fifth Circuit's is incorrect.

The principle of non-retroactivity of new rules of criminal procedure to cases on collateral review established in *Teague v. Lane*, 489 U.S. 288 (1989) is not applicable to *Apprendi* because *Apprendi* does not establish a new rule of criminal *procedure*. Rather it establishes a rule of substantive criminal law.[8] *Bousley v. United States*, 523 U.S. 614, 620 (1998) ["[W]e think it [*Teague*] is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress"].

Alternatively, if *Apprendi* establishes a rule of criminal procedure as *opposed* to a rule of substantive law, it is retroactive to first-time §2255 litigants because it falls within one of the *Teague* exceptions to the non-retroactivity rule since it establishes a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding,"[9] that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[10] *Sawyer v. Smith*, 497 U.S.

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[8] *Teague* held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," unless the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" or could be considered a "watershed rul[e] of criminal procedure." *Id.*, at 310-11.

[9] *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993).

[10] In her dissenting opinion in *Apprendi*, Justice O'Connor noted that the *Apprendi* ruling would "surely be remembered as a watershed change in constitutional law." 120 S.Ct. at 2380. The *Apprendi* decision, moreover, is "of such a nature that "without [it] the likelihood of an accurate conviction is seriously

227, 242 (1998); *United States v. Murphy*, 109 F.Supp.2d 1059 (D. Minn. 2000) [*Apprendi* is retroactively applicable to first-time §2255 movant]; *United States v. Nicholson*, ___ F.3d ____, 2000 WL 1634731 (8th Cir. Nov. 1, 2000) (Nos. 99-2206EA, 99-3128EA, 99-3674EA, 99-3674EA, 99-3803EA, 99-4194EA, 900-1135EA) [*Apprendi* retroactively applicable to first-time §2255 movant].

The *Teague* retroactivity doctrine is founded on the notion that one of the principal functions of habeas corpus review is "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted [citations omitted]." *Bousley v. United States*, 523 U.S. at 620.

The new constitutional principle established in *Apprendi* is "designed to enhance the accuracy of criminal trials" and "goes to the heart of the truthfinding function." *Allen v. Hardy*, 478 U.S. 255, 259 (1986). It is therefore retroactive to cases on collateral review, and the Fifth Circuit should not have denied Galan leave to amend on this ground.[11]

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diminished," *Teague v. Lane*, 489 U.S. at 313,

[11] *See, West v. Vaughn*, 204 F.3d 53, 62-63 (3rd Cir. 2000) [case has been "made retroactive" where the new rule is of the type available to those proceeding on collateral review even though the United States Supreme Court has not explicitly made the rule applicable to collateral proceedings nor applied it to a case on collateral review.]; *Nevious v. Sumner*, 105 F.3d 453 (9th Cir. 1996) [allowing successive petition although Supreme Court had not explicitly made rule applicable]. Accord *United States v. Johnson*, 357 U.S. 537, 544 (1982)(plurality opinion)["Court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truthfinding function and so raises serious questions about the accuracy of guilty verdicts in past trials"] and *Williams v. United States*, 401 U.S. 646, 653 n.6 (1971)[citing numerous decisions holding

If the Fifth Circuit denied Galan's motion because Galan's motion came after the district court had ruled on his §2255 motion, then the Fifth Circuit was also incorrect. F.R.Civ.P. 15(a), which governs amendments to habeas proceedings, declares an affirmative policy of allowing such amendments. Requiring that after the first amendment, subsequent amendments may be made only by leave of court or by written consent of the adverse party, it states that "leave shall be freely given when justice so requires."[12] The Court does not have unbridled discretion in its consideration of such a motion. *See, Foman v. Davis*, 371 U.S. 178 (1962) ("[O]utright refusal to grant the leave **without any justifying reason appearing** for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules [emphasis added]."). Moreover, the Court must have a "substantial reason to deny leave to amend." *Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir.1984) (quoting *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir.1981)). Furthermore, an amendment may be made at any time, even at the appellate level. *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408 (9th Cir. 1978).

The Fifth Circuit, therefore, abused its discretion in denying leave to amend because it gave not justifying reason for the denial.

In addition, Rule 60(b), F.R.Civ.P. gives Galan the right to file a Rule 60(b) motion for relief of the judgment

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retroactive, on accuracy/reliability grounds, rulings establishing and extending rights to counsel and to cross-examine one's accusers and protection against state efforts to secret witnesses and evidence relevant to proceedings].

[12] *See* also, *Slaughter v. Southern Talc Co.*, 949 F.2d 167 (5th Cir. 1991) [leave should be freely given, even after judgment]. *Lone Star Motor Import, Inc. v. Citreon Cars Corporation*, 288 F.2d 69, 75-77 (5th Cir. 1961) [leave should be freely given].

"within a reasonable time" on the ground that the court lacked subject matter jurisdiction, for any other factor rendering the judgment void, and for "**any other reason justifying relief from the operation of the judgment** [emphasis added]." A conviction which is based on instructions which omit an essential element of the offense is void. Alternatively, it is such a serious violation of due process that it justifies relief from the judgment. *See*, *Parise v. United States*, ___ F.Supp.2d ___, 2000 WL 1611999 (D.Conn. Oct 25, 2000) (Nos. 3:95CR00135 PCD, 3:00CV01046 PCD) [allowing defendant to file a motion for reconsideration in order to raise an *Apprendi* claim in the district court after the defendant's appeal of his §2255 motion was denied in the appellate court].

Galan should also have been allowed to amend because he is innocent of an offense carrying a 235-month sentence. He was found guilty of a crime carrying a maximum five year/$250,000.00 fine. It would be manifestly unjust to allow him to be sentenced to almost 20 years for a crime for which he has not been found guilty, when the maximum sentence for which he was convicted is only 5 years.

Finally, Galan should have been allowed to amend because liberal amendment accords with the this Court's reminders that the "principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." *Schiavone v. Fortune*, 477 U.S. 21 (1986). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41 (1957). This policy should be especially true regarding habeas corpus where a man's liberty is at stake.

Here Galan received nearly 20 years for a crime

which carries only 5 years. The sentence is manifestly unjust, and this Court should grant certiorari in order to clarify the issue of the retroactivity of *Apprendi* and in order to resolve an apparent split in the circuits between the Fifth Circuit which may be refusing to apply *Apprendi* retroactively to first-time §2255 litigants and the Eighth Circuit which is applying *Apprendi* to first-time §2255 movants and the district courts which have allowed first-time claimants to benefit from *Apprendi*. *United States v. Murphy*, *supra* [*Apprendi* is retroactively applicable to first-time §2255 movant]; *United States v. Nicholson*, *supra* [*Apprendi* retroactively applicable to first-time §2255 movant]; *Parise v. United States*, *supra* [allowing defendant to raise *Apprendi* on a motion to reconsider a judgment after the claim had been denied relief in the appellate court on other claims].[13]

Whether prisoners can assert an *Apprendi* claim on collateral review is an issue of vast importance to numerous inmates which should be decided by this Court in order to allay uncertainty about whether or not prisoners may assert such claims on collateral review.

CONCLUSION

This Court should grant certiorari because Galan has satisfied the *Barefoot* criteria for a certificate of Appealability. Moreover, this Court should grant the writ to establish the applicability of *Apprendi* to §2255 petitions on col-

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[13] If Mendez is not allowed to raise the *Apprendi* claim on his first §2255 petition, he may well be barred from raising it in a successive petition. *See*, discussion in *Talbot v. Indiana*, 226 F.3d 866 (7th Cir. 2000) regarding retroactivity of *Apprendi* in successive post-conviction proceedings. *See also*, *In Re: Joshua*, 2000 WL 1227966 (# 00-24328, 11th Cir., decided 8-30-2000) [*Apprendi* not applicable to successive motions to vacate].

lateral review and to allow Galan to amend his petition or to grant such other relief as may be just and appropriate.

Respectfully submitted,
ARNOLDO GALAN, Petitioner
BY: Julie Ann Epps
Counsel of Record

Julie Ann Epps: MSB#5234
Counsel of Record for Petitioner
1142 Meadowbrook Road
Jackson, Mississippi 39206-6140
Telephone: (601) 366-0165
Facsimile: (601) 981-8466

W.E. Gore, Jr.; MSB#4918
704 North President Street
Post Office Box 186
Jackson, Mississippi 39205-0186
Telephone: (601) 969-7777
Facsimile: (601) 352-8658
ATTORNEYS FOR PETITIONER,
ARNOLDO GALAN

Appendix 1
Order Of A Single Judge Of The Fifth Circuit Denying
COA Dated June 14, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED JUN 14 2000

No. 99-50969
USDC No. A097-CV-294-SS

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

ARNOLDO GALAN, also known as Ricardo Prado,
Defendant-Appellant

****

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

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ORDER:

Arnoldo Galan, federal prisoner #60373-080, has moved this court for a certificate of appealability ("COA"). He argues that he was constructively denied trial counsel and, alternatively, that his trial counsel rendered ineffective assistance. He has failed to make a substantial showing of the denial of a constitutional right regarding either issue. *See*, 28 U.S.C. § 2253(c)(2). According, his motion for COA is DENIED.

S/EMILIO M. GARZA
EMILIO M. GARZA
UNITED STATES CIRCUIT JUDGE

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Appendix 2
Order Of A Panel Of The Fifth Circuit Denying COA
Dated July 18, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
FILED: JUL 18 2000

No. 99-50969
USDC No. A097-CV-294-SS

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

ARNOLDO GALAN, also known as Ricardo Prado,
Defendant-Appellant

****

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN

****

Before DAVIS, EMILIO M. GARZA and DENNIS, Circuit Judges.

BY THE COURT:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered Appellant's motion for reconsideration. IT IS ORDERED that the motion of appellant for reconsideration is *denied*.

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Appendix 3
Order Of The Fifth Circuit Denying Rehearing en banc
Dated August 21, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
FILED: AUG 21 2000

No. 99-50969
USDC No. A097-CV-294-SS

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

ARNOLDO GALAN, also known as Ricardo Prado,
Defendant-Appellant

****

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN

****

Before DAVIS, EMILIO M. GARZA and DENNIS, Circuit Judges.

PER CURIAM:

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is

Appendix 3
Order Of The Fifth Circuit Denying Rehearing en banc
Dated August 21, 2000

DENIED.

( ) The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/EMILIO M. GARZA
United States Circuit Judge

A-5
Appendix 4
Opinion of District Court Denying Galan's
Motion to Vacate

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ARNOLDO GALAN

No. A 97-CA-294-SS
A92 CR 221(1)

V.

UNITED STATES OF AMERICA FILED JN 14 1999 AM 11:15

ORDER

Before the Court are the petitioner's Motion to Vacate and Set Aside Judgment or Correct Sentence [#103] brought pursuant to 28 U.S.C. § 2255, Memorandum [#104] and Appendix in support thereof [#105], the government's response thereto [#110], and the plaintiff's reply [#114]. All matters in this case were referred to the Honorable Stephen H. Capelle, United States Magistrate Judge, for resolution or report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges, as amended, effective January 1, 1994. On May 29, 1998, the Magistrate Judge issued his report and recommendation [#117] that the petitioner's motion be denied for failure to state a claim cognizable under § 2255 or in the alternative, that the petitioner's motion be denied for failing to prove ineffective assistance of counsel. The petitioner filed his objections to the report and recommendation on July 14, 1998 [#120]. The Court received a copy of the trial transcript on December 17,

1998. After reviewing the briefs, the trial transcript, and the applicable law, the Court is of the opinion that the Magistrate Judge's report and recommendation should be accepted in part and declined in part as explained below.

I. Background

Pursuant to an anonymous tip, state and federal officers began conducting surveillance of William Kirby's home in Hays County, Texas in late 1992. After witnessing ongoing suspicious behavior and discovering potted marijuana plants hidden under camouflage netting on the adjacent lot also owned by Kirby, the officers obtained a search warrant for Kirby's residence. Kirby managed to evade the officers and escape into the woods. When the police officers encountered Galan, Galan was exiting a game room on the lower level of the house and identified himself as Ricardo Prado. The officers found various firearms and $200,000 in cash in the game room. A search of the house uncovered a brown leather bag in an upstairs room containing marijuana, various yellow pieces of paper containing weight notations, numerous identification cards, and a passport in the name of Ricardo Herrera Prado but bearing Galan's picture. In a freestanding garage, the officers discovered nearly a half-ton of marijuana baled in weights corresponding to the entries on the yellow paper.

On March 15-16, 1993, Galan was tried on a superseding indictment charging him with possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and possession of a false passport in violation of 18 U.S.C. § 1546(a). A jury found him guilty on both counts. The conviction was upheld on direct appeal.[1]

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[1] The Fifth Circuit remanded the case for resentencing based on

Appendix 4
Opinion of District Court Denying Galan's Motion to Vacate

In the above-styled cause, Galan alleges (1) his two retained trial attorneys provided ineffective assistance of counsel, (2) he was denied due process because the Court allowed a United States Marshal to serve both as a material witness and as a bailiff at his trial, (3) he was denied due process because a witness and the prosecutor misled the jury as to how the witness would be rewarded for his testimony against Galan, and (4) he is entitled to an evidentiary hearing. Because the Court adopts the Magistrate Judge's discussion of Galan's remaining claims, the Court will only address Galan's ineffective assistance claim.

However, first it is important to explain why the Court has rejected the Magistrate Judge's determination that none of Galan's claims are cognizable in a motion under § 2255. A defendant may properly seek to vacate, set aside, or correct his sentence under § 2255 when (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the district court was without jurisdiction to impose the sentence, (3) the sentence imposed was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *See United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996); *see also United States v. Segler*, 37F.3d 1131, 1133 (5th Cir. 1994) (explaining that § 2255 is meant to address constitutional violations and other errors that could not have been raised on direct appeal and would result in a complete miscarriage of justice). The Magistrate Judge concluded Galan's claims "are actually appellate claims

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its determination that this Court failed to make explicit factual findings sufficient to support its determination that Galan had obstructed justice by giving a false name to the arresting officers. Galan did not file an appeal after his resentencing.

rather than claims of ineffective assistance of counsel." Report and Recommendation ("R&R") at 5. This is a mischaracterization of Galan's claims. Although Galan thoroughly discusses the evidence presented at trial, it is with an eye toward proving prejudice, the second prong of the *Strickland* test, not as a direct challenge to the sufficiency evidence supporting conviction. Galan is asserting a constitutional claim based on his Sixth Amendment right to counsel, and not as the Magistrate Judge calls it "simply . . . a second appeal." R&R at 8; *see also United States v. Cronic,* 104 S. Ct. 2039, 2051 n.42 (1984) (noting the government's argument that ineffective assistance claims are generally not preserved for direct appeal); *United States v. Thomas,* 12 F.3d 1350, 1368 (5th Cir.) (stating the "general rule" that a claim of ineffective assistance of counsel cannot be solved on direct appeal and noting a defendant "of course" may raise the issue in a § 2255 proceeding), *cert. denied,* (1994). The mere fact that the Court ultimately finds, as it does here, that Galan has failed to prove one of the prong of the *Strickland* test does not mean, retrospectively, that Galan failed to properly assert a constitutional claim.

II. Petitioner's Claims of Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, the petitioner must allege and prove (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington,* 104 S. Ct. 2052, 2064 (1984). To meet the first prong, a petitioner must prove that his counsel's representation fell below "an objective standard of reasonableness" considering all the circumstances. *Strickland,* 104 S. Ct. at 2064-65 (stating that reasonableness should be judged under prevailing

professional norms); *see also Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2977 (1993) (explaining that an attorney's performance is deficient if the attorney's errors were so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment).

The attorney's conduct is reviewed with great deference, and "[t]he petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 104 S. Ct. at 2065 (internal citations omitted); *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987). Accordingly, the attorney's strategic choices made after a thorough investigation of the relevant law and facts including decisions regarding whom to call to testify at trial, "are virtually unchallengeable." *Strickland*, 104 S. Ct. at 2066. A particular decision not to investigate must be assessed for reasonableness under the circumstances. Id. (emphasizing that the Court must apply a "heavy measure of deference" to counsel's judgments).

To establish prejudice, the petitioner must show the errors led to a trial "whose result is unreliable." *Strickland*, 104 S. Ct. at 2064; *see also Emery v. Johnson*, 123 F.3d 213, 218 (5th Cir. 1997) (explaining that a petitioner is prejudiced if his counsel make the types of mistakes that would render the verdict fundamentally unfair or unreliable). Specifically, the petitioner must demonstrate a reasonable probability that without the errors of his counsel, the jury would have "harbored a reasonable doubt concerning guilt." *Id.* at 218-219. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 104 S. Ct. at 2068.

Although prejudice may be presumed under certain circumstances, none of them is applicable here. *Id.* at 2067 (explaining that certain kinds of state interference with defense counsel's autonomy or when counsel has an actual conflict of interest, prejudice will be presumed).

To succeed, the petitioner must make "a very strong showing" of ineffective assistance by specifically identifying the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment because of the "very strong presumption that the performance of counsel falls within the wide range of reasonable professional assistance." *United States v. Samuels,* 59 F.3d 526, 529 (5th Cir. 1995); *see also Strickland,* 104 S. Ct. at 2066.

At Galan's trial, Kirby testified that he had been storing approximately 3000 pounds of marijuana for Galan. Kirby claimed the $200,000 discovered by the police was Kirby's repayment to Galan for some marijuana Kirby had sold to others. To corroborate Kirby's testimony, the government offered evidence of the brown leather bag discovered in an upstairs room which contained marijuana, papers alleged to be a drug ledger, various pieces of identification, and a passport in the name of Ricardo Prado bearing Galan's picture. The government offered additional testimony that the weights of the marijuana discovered in the garage corresponded to the notations on the alleged drug ledgers.

Galan concedes that this evidence was sufficient to support the jury's verdict. However, Galan alleges that his attorneys' failure to adequately impeach this evidence or present controverting evidence denied him constitutionally effective counsel. Specifically, Galan claims his attorneys (a) failed to investigate facts and law and develop a viable,

available defense; (b) failed to discredit Kirby, a key witness; (c) failed to impeach the demonstrative evidence connecting Galan to the crime; (d) failed to consult or call experts; (e) failed to object to evidence of other offenses or ask for limiting instructions; (f) failed to object to the prosecution's misstatement concerning the legal definition of aiding and abetting; (g) failed to objected to the government's improper bolstering of Kirby's credibility; (h) failed to object to various other errors; and (i) failed to develop viable defenses at sentencing. Galan asserts he was prejudiced by these errors.

Alternatively, relying on *United States v. Cronic*, 104 S. Ct. 2039 (1984), Galan argues prejudice should be presumed because his attorneys "wholly failed to subject the prosecution's case to meaningful adversarial testing." Id. At 2047, 2046-48. This reliance is misplaced. The Court in *Cronic* referred to *Davis v. Alaska*, 94 S. Ct. 1105 (1974) as illustrative of the cited language. In *Davis*, the defendant was accused of breaking into a bar and stealing a safe. The empty safe was found near the home of Jess Straight. Straight's step-son, Richard Green, identified the defendant as one of two men whom Green had seen on the property and stated the defendant was carrying a crowbar. Green, a juvenile delinquent, was on probation for burglarizing two cabins at the time he observed the defendant. At trial, the defendant's counsel attempted to use Green's probationary status to show Green's bias for cooperating with the police, but the trial court refused to allow it based on an Alaska statute protecting the criminal records of juveniles. The Supreme Court found the defendant had been denied his Sixth Amendment right to effective cross-examination. *See id.* at 1111. *In Cronic*, the Court explained that apart from circumstances of the magnitude present in *Davis*, "there is

generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, *104* S. Ct. at 2047 n.26.[2] Fifth Circuit precedent makes it clear that prejudice should not be presumed in this case. *See Jones v. Jones*, 163 F.3d 285, 299 (5th Cir. 1998) (finding there has been no complete failure to subject the prosecution's case to adversarial testing when counsel attempts to suppress the defendant's statement and other evidence, objects to the evidence at trial, and cross-examines the prosecution's witnesses); *Jackson v. Johnson*, 150 F.3d 520, 524 (5th Cir. 1998) (recognizing that the Fifth Circuit has refused to presume prejudice "when defense counsel investigated certain issues but not others; when counsel's trial preparation was 'somewhat casual;' when counsel failed to pursue a challenge based on racial bias injury selection; when counsel failed to object to a variation between the indictment and the jury charge; and when counsel failed to raise a meritorious issue on appeal"); *Childress v. Johnson*, 103 F.3d 1221, 1228, 1229 n.12 (5th Cir. 1997) (explaining that "bad lawyering, regardless of how bad, does not support the [per se] presumption of prejudice under *Cronic*" and suggesting that an attorney's failure to call defense witnesses and concession in closing that the guilt against the defendant was overwhelming are

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[2] The Court in *Cronic* further noted that prejudice had been presumed in *Powell v. Alabama*, 53 S. Ct. 55 (1932) when the defendants were indicted for a "highly publicized capital offense" and were appointed counsel merely moments before the trial began. The Court explained that prejudice could be presumed because the circumstances were such that there was a small likelihood that any attorney could provide effective assistance. *See Cronic*, 104 S. Ct. at 2047.

the type of trial errors that must be subjected to the *Strickland* analysis). Despite the panoply of errors alleged by Galan, it is clear that his attorneys were present during the trial and cross-examined witnesses, however maladroit or unpersuasive their presentation might have been. To prevail on this claim, Galan must prove prejudice under *Strickland.*

A. Failure to Investigate and Develop Available Defense

Galan states his attorneys were ineffective for failing to properly discredit Kirby or challenge the government's assertion that the drug ledgers belonged to Galan. Galan claims the "only discernible defense at trial was that the seizure of the marijuana was illegal." Galan's Objections to Report and Recommendation of the Magistrate Judge [#120], at 11. A review of the trial transcript reveals this is not the case. The main strategy at trial was to argue that Galan was an innocent bystander who happened to be in the wrong place at the wrong time. *See* Tr. 414. Galan's attorney's repeatedly emphasized that none of the police surveillance revealed any information about Galan. *See, e.g.,* Tr. 96, 104-05 (cross-examination of John Luna); Tr. 185-86 (cross-examination of Juan Hinojsa); Tr. 21 1 (cross-examination of Douglas Vance). Contrary to Galan's argument, his attorneys did attempt to impeach Kirby by showing how Kirby benefited by helping the government. *See* Tr. 136, 140 ("Q: But the bottom line, Mr. Kirby, is that you have everything to gain to come in here and say what the Government wants you to say? A: Correct."). Galan's attorneys also challenged the government's claim that the drug ledgers were originally found in a bag with Galan's identification. See Tr. 279-80 (cross-examination of Johnny Gray); Tr. 305-06 (cross-examination of Kent

Radney); Tr. 351, 353 (cross-examination of Penny Dunn). The failure to retain a crime scene expert and a handwriting expert does not render Galan's attorneys performance below a level of reasonable competence.[3] Counsel's failure to properly litigate Galan's Fourth Amendment claim is insufficient, by itself, to establish ineffective assistance. As Galan concedes, it is unlikely that the claim was meritorious based on Galan's lack of standing. *See Kimmelman v. Morrison*, 106 S. Ct. 2574, 2583 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that [the] claim was meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.").

B. Failure to Discredit Kirby

Galan claims his counsel was ineffective because they failed to inform the jury that Kirby's potential

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[3] In the instant motion, Galan is under the mistaken impression that his attorneys were attempting to relitigate the suppression motion during the trial. Galan contends that this mistaken strategy resulted in the admission of otherwise inadmissible hearsay evidence, such as the informant's tip. Galan fails to recognize that this information is not hearsay because it was being offered to explain how the police became interested in Kirby's property and not for the truth of the matter asserted.

Galan misinterprets the meaning of counsel's statement in closing that "if anybody can be caught in a criminal case, they've got to be caught by the rules." Instead of referring to the legality of the search, it is clear from the context that the attorney was arguing that a defendant must be convicted by evidence beyond a reasonable doubt and not on mere suspicion and innuendo. See Tr. 414-15.

liability for his criminal acts went from life without the possibility of parole to a potential for parole. As mentioned above, Galan's counsel made it abundantly clear, both during cross-examination of Kirby and in closing arguments, that Kirby had "everything to gain" by cooperating with the government and pointing the finger at Galan. *See* Tr. 127-36 (cross-examination); Tr. 404-05, 413-14 (closing argument). These arguments were sufficient to impeach Kirby's credibility before the jury. Galan's argument that his attorneys should have been more explicit about the "real deal" is patently frivolous. No lawyer, even the most competent and experienced ones, can give an accurate range under the United States Federal Sentencing Guidelines until the Probation Department has prepared a Pre-Sentence Report. During Galan's trial, the quantity of marijuana that Kirby would be deemed responsible for was unclear, thus rendering an accurate estimate of Kirby's possible sentence impossible.

C. Failure to Impeach Demonstrative Evidence

Galan argues his counsel was ineffective for failing to argue that the drug logs and identification documents were inadmissible because the government could not prove those items were in the bag when it was seized and searched. Alternatively, Galan argues his counsel should have presented evidence, in the form of expert witnesses, that the items were placed in the bag by the officers during the execution of the search warrant. As discussed above, Galan's attorneys did argue that the identification was taken from Galan during his arrest and placed by one of the officers in the bag before the evidence technician arrived at the scene. Johnny Gray, the evidence technician, stated he had no knowledge about whether another officer could have taken the identification cards from Galan and

placed them in the bag, but admitted it was possible. *See* Tr. 279-80. Gray also admitted that he was unable to obtain any fingerprints from the bag matching Galan's fingerprints. *See* Tr. 260, 290-91. Kent Radney, a member of the SWAT team who executed the search warrant on Kirby's residence, admitted he took Galan into custody, emptied Galan's pockets, took Galan's wallet and drivers license, and gave these items to another police officer. *See* Tr. 305-06. This testimony was emphasized during closing arguments. *See* Tr. 410. Finally, Galan's attorney cross-examined Penny Dunn, part of the task force, and got her to admit that she could not remember if one of the drug ledger sheets came from the bag originally. He also attacked Dunn's statement that the notations on the drug ledger corresponded to entries in Galan's address book. *See* Tr. 351, 353. In closing arguments, Galan's attorney argued that finding the documents in the bag was "staged" in light of the conflicting testimony about Galan's drivers license and the inability to lift prints off the bag, as well as the conflicting testimony about where the drug ledgers were originally found. *See* Tr. 410-413. These attacks on the demonstrative evidence were constitutionally sufficient to constitute effective assistance of counsel.

D. Failure to Call Experts

Galan challenges his attorneys' failure to call a crime scene expert and a handwriting expert. Although calling these types of witnesses would have been a legitimate trial strategy, the Court declines to find, in the context of this record, that they were constitutionally required to retain such experts. As discussed above, the attorneys raised these issues before the jury and argued them during closing arguments. The jury might have been more persuaded by expert testimony, but the jury might

have rejected that testimony. Given the evidence against Galan, his attorneys made a reasonable strategic decision not to retain expert witnesses. *Cf Turner v. Johnson*, 106 F.3d II 78, 1188 (5th Cir. 1997) ("[F]ailure to present mitigating evidence if based on an informed and reasoned practical judgment, is well within the range of practical choices not to be second-guessed and thus cannot constitute deficient performance.") (internal citations omitted).

E. Failure to Object to Evidence of Other Offenses

Citing Federal Rule of Evidence 404(b), Galan criticizes his attorneys for failing to object to the admission of the drug ledgers found in the bag with his identification and for failing to object to Dunn's testimony correlating the entries in the drug ledgers with entries in Galan's address book. Galan alleges the government was improperly using evidence of his prior drug sales to prove his bad character and to imply conformity in this instance with that bad character. This argument is wholly without merit. The evidence was admissible for many of the reasons listed in 404(b) including as proof of intent, plan, knowledge, and absence of mistake. Although it might have been appropriate to ask for a limiting instruction, such a request would have been incompatible with the legitimate strategy chosen by the defense in this case, which was that the ledgers and the marijuana did not belong to Galan.

Galan also complains because his attorneys failed to object when Marshall Hopkins testified that he discovered Galan used the alias Ricardo Prado by checking Galan's prior arrest record. Hopkins testified that the "information . . . [he] got out of the system indicated that Ricardo Prado was also an alias name for Arnoldo Ozuna Galan." Tr. 293-94. When asked about the steps he took to determine if

Galan and Prado were the same person, Hopkins testified that he had "obtained fingerprints from the Del Rio office where . . . [Galan) had been previously arrested" and asked a fingerprint analysis expert to compare those fingerprints with the ones obtained from Galan on this charge. Tr. 294. First, as noted by the Magistrate Judge, the fact of Galan's prior arrest was admissible because Galan's identity was properly at issue in the case. Second, it was an appropriate tactical decision to not draw further attention to Hopkins's statement by requesting a limiting instruction considering the brevity of Hopkins's testimony, there was only one reference to the prior arrest, and Hopkins did not state the crime underlying the prior arrest.

F. Failure to Object to the Prosecution's Misstatement Concerning the Legal Definition of Aiding and Abetting

Galan asserts his counsel was ineffective for failing to object when the prosecution told the jury during closing argument, "If you take an act or join into an illegal activity at one point, you are aiding and abetting that activity. You become part of all of the activity . . . ." Tr. 390. Galan argues this is erroneous because it neglects the inform the jury that aiding and abetting requires the defendant to act with the specific intent to further the crime, relying on *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993). The Court agrees with the Magistrate Judge that Galan suffered no prejudice from the prosecutor's statement because the jury instructions given by the judge and considered by the jury during their deliberations clearly stated "before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime."

Tr. 381, 381-82. Galan's reliance on *Gray* is unpersuasive. In *Gray*, the Fifth Circuit found the defendant's counsel ineffective when the court erroneously instructed the jury as to the elements of attempted murder and defense counsel failed to object, even though both the prosecutor and the defense counsel argued the law properly during closing arguments. *See Gray*, 6 F.3d at 271, 269-271 (refusing to conclude that the jury ignored the court's erroneous instruction and instead applied the law as stated correctly by counsel). Galan has not presented sufficient evidence for this Court to disturb the presumption that juries follow the instructions given by the court, *see Zafiro v. United States*, 113 S. Ct. 933, 939 (1993), and the Court declines to find that the jury followed the prosecutor's misstatement of the law under these circumstances. The failure to object to the prosecutor's statement during closing did not prejudice Galan in any way.

G. Failure to Object to Government's Improper Bolstering of Kirby

Galan argues his attorneys were ineffective for failing to object to the government's discussion of the terms of Kirby's plea agreement on direct examination in violation of Federal Rule of Evidence 608(a)(2). Specifically, Galan claims the government improperly bolstered Kirby's credibility on direct by pointing out that the plea agreement required Kirby to give truthful testimony and that Kirby was not immunized from perjury charges if he lied to the jury. *See* Tr. 125-26. Contrary to Galan's contentions, this line of questioning did not improperly bolster Kirby's credibility; it merely presented the entirety of the plea agreement and Galan has failed to cite any Fifth Circuit precedent to support his claim. Even if the questioning were improper, the error is harmless in light of

the record. Galan's attorneys did challenge Kirby's credibility on cross-examination by pointing out that Kirby had every incentive to cooperate with the government and testify against Galan. *See* Tr. 136. This justified the government's mention of the perjury possibility in closing arguments.

H. Failure to Object to the Court's Use of a Material Witness as Bailiff

Galan alleges his counsel should have objected to the Court's use of Hopkins, a material witness, as bailiff. No relief is available on this claim because Hopkins, a member of the United States Marshal's Office, did not serve as the bailiff in Galan's trial, nor have members of the Marshal's Office served as bailiffs in other trials. The Court's bailiff is always a Court Security Officer. As a member of the Marshal's Office, Hopkins might have remained in the courtroom as a security officer, but he would not have had any individual contact with the jury. The discussion in the record concerning Hopkins implies he was not present in the courtroom except while he testified as a witness. *See* Tr. 56 ("The Court: I don't want [Hopkins] being court security if he's going to be a witness."); Tr. 69 (the Court ordering Hopkins to go to the Marshal's Office and get another officer to serve as court security). Because the Court did not permit a witness to serve as court security, there was nothing to which Galan's attorneys should have objected.

I. Failure to Develop Viable Defenses at Sentencing

Galan claims his attorneys should have investigated and discovered evidence to discredit Kirby or evidence concerning his ownership of the drug logs so that he would not have been sentenced for three thousand pounds of marijuana. As discussed above, the attorneys made

sufficient attempts to discredit the government's case. Galan has failed to identify any more persuasive evidence that would have caused the Court to sentence Galan based on a lesser quantity of drugs.

"Judges wisely defer to true tactical choices - that is to say, to have the potential for both benefit and loss." *Profitt v. Waldron,* 831 F.2d 1245,1249 (5th Cir. 1987) (finding counsel's decision not to review the defendant's mental institution records and thus bypass an insanity defense was not a tactical choice because the could see *"no advantage"* in the decision and "the usual deference to tactical decisions [was] not relevant") (emphasis in original). A trial decision made on a fundamental misunderstanding of the law is not informed and should not receive the same deference as truly tactical decisions. *See id.* (stating that counsel's admitted misunderstanding of the burden of proof on the insanity defense "undercuts any claim that the decision to forego the insanity defense was 'informed"'). A complete lack of pretrial preparation is not a reasonable trial strategy. See *Kimmelman v. Morrison,* 106 S. Ct. 2574, 2588-89 (1986) (recognizing that a complete lack of pretrial preparation puts at risk the reliability of the adversarial testing process). The record in this case shows that Galan's attorneys made adequate trial preparation and proceeded according to a reasonable trial strategy given the amount of evidence against Galan. The Court declines to find, based either on the totality of the alleged errors or individually, that Galan's counsels' performance fell below an objective standard of reasonableness or that Galan was prejudiced by any of the alleged errors.

In accordance with the above discussion, the Court enters the following orders:

IT IS ORDERED that the Magistrate Judge's report

and recommendation [#117] is ACCEPTED IN PART and DECLINED IN PART; and

IT IS FURTHER ORDERED that Galan's Motion to Vacate and Set Aside Judgment or Correct Sentence [#103] is DENIED.

SIGNED this the 14th day of June 1999.

S/ SAM SPARKS
UNITED STATES DISTRICT COURT

A-23

APPENDIX 5

JUDGMENT OF CONVICTION AND SENTENCING

UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES OF AMERICA

Filed May 20 12:11 PM '94
RESENTENCING

V. Case Number A-92-CR-221(1)-SS
USAO #92-055592

ARNOLDO GALAN
a/k/a Ricardo Prado, Fernando Diego Garza,
Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ARNOLDO OZUNA GALAN, was represented by Richard D. Woods and Robert Crider.

The defendant was found guilty on counts S1 and S2 of the superseding indictment by a jury verdict on March 16, 1993 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Numbers
18 USC 841(a)(1)	POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA	11/16/92	S1
18 USC 1546(a)	POSSESSION OF FALSE PASSPORT	11/16/92	S2

APPENDIX 5
JUDGMENT OF CONVICTION AND SENTENCING

As pronounced on May 12, 1994, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) S1 and S2, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19th day of May, 1994.

S/ Sam Sparks
SAM SPARKS
United States District Judge

Defendant's SSN: 460-25-8335
Defendant's Date of Birth: 09/11/57
Defendant's address: c/o HAYS COUNTY JAIL, 1307 Old Uhland Rd., San Marcos, TX 78666

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED THIRTY-FIVE (235) months, as follows:

APPENDIX 5

JUDGMENT OF CONVICTION AND SENTENCING

Count S1 – 235 Months

Count S2 – 60 Months

IT IS FURTHER ORDERED that the term of imprisonment imposed on Count S2 shall run concurrently to the term of imprisonment imposed in Count S1.

The court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to serve his sentence at an institution located as near Del Rio, Texas as security will permit. Further, the Court recommends that the defendant receive treatment and counseling for alcohol and drug abuse during the period of incarceration.

The defendant is continued in the custody of the United States Marshal pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshall

BY _____
Deputy Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) years.

APPENDIX 5

JUDGMENT OF CONVICTION AND SENTENCING

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

_X_ If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_X_ If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

_X_ The defendant shall not possess a firearm or destructive device.

_X_ The defendant shall participate in a drug and alcohol abuse programs during the period of supervision and submit to drug testing at the direction of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

(1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

(2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
(4) The defendant shall support his or her dependents and meet other family responsibilities.
(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
(6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
(10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
(11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
(12) The defendant shall not enter into any agreement to

act as an informer or a special agent of a law enforcement agency without the permission of the court.

(13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

Guidelines Range Determined by the Court:

Total Offense level:	36
Criminal History Category:	I
Imprisonment Range:	188 months to 235 months
Supervised Release Range:	5 years
Fine Range:	$20,000.00 to $4,000,000.00
Restitution:	$0

The fine is waived because of the defendant's inability to pay.

The sentence is within the guidelines range, that range exceeds 24 months, and the sentence is imposed for the following reasons: Seriousness of the offenses and conviction.

APPENDIX 7
PLEA AGREEMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

Filed Feb 24 4:06 PM '93
SUPERSEDING INDICTMENT

V. Criminal No. A-92-CR-221-SS
[Violation: 21 U.S.C. 841(a)(1) Possession with intent to distribute marijuana; 18 U.S.C. 1546(a) - Possession of false passport.]

ARNOLDO GALAN
a/k/a Ricardo Prado,
and
JOEL PROCTOR KIRBY,
Defendants

THE GRAND JURY CHARGES:

COUNT ONE
[21 U.S.C. §841 (a)(1)]

On or about November 16, 1992, in Hays County, in the Western District of Texas, the Defendants,

ARNOLDO GALAN
a/k/a Ricardo Prado,
and
JOEL PROCTOR KIRBY,

Knowingly and intentionally did possess with intent to

distribute marijuana, a Schedule I Controlled Substance in violation of Title 21, United States Code, Section 841(a)(1)

COUNT TWO
[18 U.S.C. §1546(a)]

On or about November 16, 1992, within the Western District of Texas, the Defendant,

ARNOLDO GALAN
a/k/a Ricardo Prado,

did knowingly possess a document, to-wit: a passport, prescribed by statute and regulation for entry into the United States and as evidence of authorized stay in the United States, which the defendant knew to be falsely made and procured by means of a false claim and statement and otherwise procured by fraud and unlawfully obtained, in that the defendant possessed a passport with the UNITED STATES OF AMERICA printed on the face of the passport, and bearing the photograph of the defendant, ARNOLDO GALAN, and the false name of Ricardo Herrera Prado, in violation of Title 18, United States code, Section 1546(a).

A TRUE BILL:
S/Majorie M. Bounds
FOREMAN

RONALD F. EDERER
United States Attorney
BY: S/Elizabeth Cottingham
ELIZABETH COTTINGHAM
Assistant U.S. Attorney